Supreme Court, U.S.
FILED
JUL 29 2010
OFFICE OF THE CLERK

No. 10-495

SUPREME COURT OF THE UNITED STATES

LAURA ELLEN KAPLAN ,
Petitioner

V.

DANIEL RAY SLAYTER,
Respondent

On Petition for Writ of Certiorari
To The Louisiana Third Circuit Court of Appeal

APPENDIX

Timothy D. Shumate
Counsel of Record
The Shumate Law Firm, LLC
4501-A Jackson Street Extension
(318) 623-6655

CIVIL SUIT NUMBER 227,135

DANIEL RAY SLAYTER NINTH JUDICIAL DISTRICT COURT

VERSUS PARISH OF RAPIDES

LAURA ELLEN KAPLAN STATE OF LOUISIANA

REASONS FOR JUDGMENT

This is a custody dispute between Laura Kaplan and Daniel Ray Slayter, and their entire families, over Anna Grace Kaplan, born on 1/30/07. The couple has had an "on again off again" relationship for about four years, but never married. Both parties have engaged in vindictive behavior that greatly affects their own credibility. The court has no hesitation to say that this is the most contentious custody dispute she has ever had presented.

Part of the problem in this case has been the duration of the dispute and the constant transfer among Divisions of the court. Three judges have recused and multiple Motions to recuse have been filed, all by Daniel Slayter, who has been acting as his own attorney for as long as the case has been assigned to Division C. Frankly, the court sees all of this action against the mother, the mother's family, the mother's Jewish faith, the judges and various attorneys, as an indication of Mr. Slayter's willingness to make a hard attack on anyone involved in the custody process. The court further believes that Mr. Slayter believes in the appropriateness of the action at the time it occurs, but only later comes to recognize the destructive nature of the action.

There have been multiple experts appointed to assist the parties and the court. Dr. Randy Logan was appointed early in the process by Judge Randow, to serve as a Parenting Coordinator under LSA R.S. 9 354.1 *et. seq.*, to assist the parties in preparing for a custody plan. This court held a telephone conference with Dr. Logan, with the consent of Ms. Kaplan and in the presence of Mr.Slayter. Dr. Logan saw the couple three to four times together and saw Mr. Slayter a few times after that, but withdrew when he concluded he could not be effective with the level of conflict that existed between the parties. When asked, Dr. Logan gave the opinion that his efforts might have had more success, if there had been a custody plan in place at the time, to set the boundaries for Mr. Slayter's visitation. As is was, the conflict prevented the implementation of any plan and Mr. Slayter has had only day-time supervised visitations. Had the couple been able to cooperate, Mr. Slayter would have had more visitation; instead, Mr. Slayter continued the vicious internet attacks that further enraged the Kaplan family and further solidified the mother's belief that Mr. Slayter should have Haile or no visitation of Anna Grace, who was still an infant.

Judge Randow also appointed Dr. Daniel Lonowski, who evaluated both parties twice. As his reports indicated, the first rounds of tests were either invalid or inconclusive and led to retesting. The results of the dual testing led him to the conclusion that both parties have personality issues, rather than any mental health problem. They are not unalike. Counseling has been recommended for both parties The mother has accepted the recommendation and is still engaged in therapy with Dr. James Quillen, whose records and reports were produced in response to discovery and, unfortunately, became the subject of much testimony

during trial. The father attacked on the basis of the mother's report to Dr. Quillen that she did engage in drug use for a short period of time. This behavior was far in the distant past and it occurred before the child was born, but the father greatly exaggerated the drug use and included this in internet attacks and trial testimony.

This court appointed an Attorney to represent the child and the attorney made a written recommendation to the court. At a conference before trial, the court asked the parties to respond to the recommendation. No agreement could he reached, particularly after a confrontation between the father of the child and the maternal grandfather. At the conference, Mr. Slayter did exhibit great self control and stepped through the doorway to the conference room, while the grandfather condemned what he perceives as disrespect for his daughter and himself, as well as anti-Seniitism by Mr. Slayter. The grandfather had assisted the parties throughout this dispute by transporting the child to and from visitation, as did Mr. Slayter's mother and grandmother; yet, Mr. Slayter regularly attacked the grandfather's generosity in employing and housing his own daughter, as she has tried to care for Mr. Slayler's child.

The court does not believe for a minute that the animosity will disappear, unless the parties engage in a serious effort at counseling over a period of time. The parties must understand that this type of conflict and name calling is the most destructive thing they can do to the child. The father might as well reach over and slap the child's face as call her mother a "drug using Jewish whore." The mother might as well do the same as call the father a terrifying and dangerous man. The child will understand

that she is one-half of each parent and the name the other parent is called applies to her too.

The parties are the one's who created this situation of having to share a child. Mr Slayter knew Laura Kaplan was Jewish and she knew he was not. Apparently, before the clii Id was born, Mr. Slayter was able to express sympathy and admiration for the Jewish people. Now, he uses the terms "Jewish" like a curse word and writes letters to Ms. Kaplan's counsel that reveal a insidious anti-Semitic attitude that he thinks justifies a greater right to raise the child Christian.

As Ms Kaplan tells it, she believed Mr. Slayter was abusive long before the child was conceived; yet, now he is so terrifying, she can't be in his presence. Unfortunately, Ms Kaplan is in the same position that many abused women occupy - they have to find a way to raise a healthy female child, with a positive attitude toward her father and men, in general. That may mean, Ms. Kaplan has to reconcile within herself those factors that led to her accepting an abusive relationship and objectify the unacceptable behavior, without creating in the child the subjective bclicf that the father is someone who will hurt her or her mother. Of course. if the father does not stop the constant attacks on the mother, he may well prove the mother right and lose his rights to the child.

Considering all of the above, the court makes the following custody award The mother is granted sole custody and the father is awarded visitation in accordance with the schedule set forth below. The evidence of continued and unreasonable conflict is clear and convincing evidence that

these parents are not able to jointly parent the child. The court actually believes that the mother has had no incentive to cooperate. She has been the primary parent for two years, while the father has only had supervised visitation. During this time, she has had the opportunity to bond with the child and be with the child daily. She is far less confrontational and vituperative and is the better person to nurture a child of two years. There is no way this court would suddenly take the child out of the mother's primary care, even if the court thought joint custody were possible. It is unfortunate that the father changed counsel so often and, then, rejected any counsel and continued the fight pro se. The longer the fight, the stronger the mother's position became and by continuing the fight, he simply put the possibility of joint custody further and further away from his grasp.

The very issues that have separated the parties - religious faith, child care, verbal abuse -- are major issues that, in the event of disagreement, the domiciliary parent would have to decide. We already know the parties disagree and, thus, the domiciliary parent would automatically reject the other parent's opinion and joint custody would be futile. The court does not believe that the father would ever understand or accept that "joint custody" would still mean that the domiciliary parent had the right to make a decision with which he disagreed. Further, this is a case where the mother has felt abused all throughout the relationship. The father's invective, alone, can be intimidating and she has to overcome the too-ready surrender of the past. She is already in counseling, but it will take time for the parties to be equal in their ability to discuss and cooperate.

The court wishes to make it clear to the parties that the award of sole custody is because of the ongoing conflict. The court sees Mr. Slayter as the one who is more vicious in his attacks and the one who more consistently loses sight of the real effect of his conduct. This view is certainly supported by Dr. Lonowski's evaluation of the parties. The father has some very hard lessons to learn, ones that are more difficult than those the mother needs to understand. Considering that the mother has already sought counseling makes it seem more likely that she will learn what she must do to make decision, that arc in the best interest of the child.

As the party with sole custody, the mother will have the right to determine the child's spiritual and cultural upbringing. The court makes this declaration to the parties to try and have the father understand that the issue of Jewish vs. Christian did not enter at all into the courts determination that sole custody was warranted, except for the fact that it was one more issue on which the couple could not agree. It is the number of conflicts and the virulence of the father's attacks that made the court decide joint custody would not work. As the result of the court's decision that there should he sole custody, the mother has the sole authority to decide the child's religious preference.

It is also apparent to the court that the mother is the better parent to provide spiritual guidance for the child. Clearly the mother has a strong identification with her Jewish heritage and has a stronger and more positive faith in God. The father repeatedly said he was an agnostic, which means to the court, he holds that God and the nature of things are unknown or unknowable; yet, he said he wanted to raise the child as a Christian. If the father is

insists he does not believe in the Christian faith, one has to suspect that he simply cannot bring himself to agree with the mother. The court believes that all Jewish children in this country are certainly exposed to the beliefs and ideals of Christianity; the mother won't be able to prevent a general exposure, but it is within her authority to decide what belief system is presented to the child in her home in which the child visits or resides. The conflict must end.

The court will award the father unsupervised and overnight visitation on the following schedule and in accordance with the exchange rules discussed below.

FOR THE YFAR 2009

1) Three consecutive Saturdays during the day:

January 3, 10 and 17 , 2009, the father shall have visitation from 9:00 A.M. to 5:00 P.M.

2) Three consecutive Fridays overnight and the following Saturday:

January 23, 30 and February 6, 2009. the father may pick up the child at 5:30 P.M on Friday and keep the child until 5:30 P.M. on the following Saturday. January 24, 31, and February 7, 2009.

3) Alternating weeks of two overnights on Monday and Tuesday:

Beginning on Monday, February 16, 2009, if all other visits have taken place without any conflict, the father shall have visitation from 5:30 P.M. until Wednesday, February 18, 2009, at 5:30 P.M and the same schedule in alternating weeks. For example, the next alternating two

nights will begin on Monday. March 2 at 5:30 P.M. and the father will have visitation until Wednesday, March 4, 2009, at 5:30 P.M. The next alternating two overnights will begin on Monday. March 16, 2009, at 5:30 P.M. and will continue until 5:30 P.M. on Wednesday March 18, 2009. The next alternating two nights will begin on Monday, March 30 at 5:30 P.M. and continue until Wednesday April 1.2x109 at 5:30 P.M. This rotation will continue, unless interrupted by a holiday as discussed below. and continue as before the holiday for the entirety of the year 2009.

The court has devised the 2009 schedule to allow the father consecutive nights with the child, while avoiding Sundays. There is little trust between the parties and the court feels it is in the best interest of the child to eliminate any question of whether the child gets taken to any church service on Sundays or Wednesday night. li

4) Alternating Saturdays, 9:00 A.M. to 5:30 P.M. during the day:

In addition to the two overnights in alternating weeks, the father may enjoy visitation on alternating Saturdays from 9:00 to 5:30 P.M. For example, when the father has visitation in the week beginning Monday February 1 – Wednesday February 18, 2009 at 9:00 a.m., he shall not also have the Saturday following the Thursday, but the Saturday preceding the Monday. Thus, the father should have a total of four overnight visits per month, plus two Saturdays during the month. The court believes that having Monday and Tuesday nights is not as desirable as Friday and Saturday, which is standard and would allow the father to have what is expected to be a day off with the child, and, therefore, the court will allow the father two

Saturdays to enjoy the day with the child. Tie court does note that the father is presently unemployed but has been a school teacher and alight have the summers off if he does not have a second job during the summer.

5) Day Care

As sole custodian, the mother will determine daycare. At present, the mother/Grandfather employ a "nanny." The father objected to the Nanny on the basis that Jews preferred a Nanny to avoid exposure to Christianity, which is ridiculous. The court has no idea how long the present living an-arrangements will remain the same, as the mother indicated she may marry soon. If the father becomes employed, he may select a commercial day care for the two weekdays he will have the child.

6) Exchanger

The parties have been relying on family members to make exchanges of the child. This is no longer acceptable. The father's mother and grandmother are either too frail or unavailable for making the exchange. These are the reasons that the father gave for his appearing at two exchanges, despite specific orders that he not appear. It is evident that the father can convince himself he has a good enough reason to disregard court orders. This court did not hear any reason good enough for the father to appear at any exchange.

On the first occasion, Mr. Slayter said the grandmother was too frail to handle the two year old child and he had to be there to help, even though the maternal grandfather was appearing on behalf of the mother. Apparently, the families are so conflicted that the

grandmother cannot speak to the mother's father, with whom the child is most familiar. and ask for his assistance in getting the two year old in her car. On the second occasion, the father got a male friend, a stranger to the child to go to the exchange, ostensibly to help the grandmother, but the father also went to the exchange.

The mother's family has become totally frustrated with dealing with the father, who makes excessive and pejorative contacts with anyone and everyone, including the father's office and the office secretary. In fact, Laura Kaplan's father cannot contain the rage he feels at the publications Mr. Slayter has made about Laura and Jews in general on Slayter's "My Space" internet page. Likewise, Mr. Slayter's family is totally committed to his position. Mr. Slayter's mother testified that she still would not be able to restrain herself from preaching to the child about Jesus, even if the child was to be raised Jewish.

Mr. Slayter will simply have to bear the brunt of the total chaos that has been created in the family relationships. Nothing- even depravation of the father's company- is more harmful to the child than conflict, itself. The court does not believe the mother has been entirely blameless in the initial conflict two years ago between her and the father, but the court does believe that Mr. Slayter is entirely responsible for the continued conflict and the publication of gross insults about the mother and the Kaplan family and for what is tantamount to harassment of those surrounding them. He cannot simply insult any and all as he pleases and expect to have equal access to the child. His own conduct has put him in a position of distrust and he needs to prove to the court that he can show

respect for the mother, her family and her faith, because respect for the mother is respect for the child.

Consequently. the parties arc ordered to exchange the child at the Alexandria Police Station on Bolton Avenue or the RPSO desk on the third floor of the court house. They will have to obtain information to establish a routine of the mother arriving early to have a police officer standing at her side to witness and protect, to the extent she feels it is necessary. Then, Mr. Slayter will have to wait for her to leave. meaning drive away in her car, before he is to leave the building.

The court has no hesitation to say that the mother needs to act more for herself than she has in the past even if she remains afraid of Mr. Slayter. She testified that he has struck her during quarrels, but that as during their relationship two years ago. She showed quite a hit of independence and carefree behavior before the child was born but now acts totally dependent on her father, who has gone through as much abuse as she has. She is now 29 years old and needs to demonstrate to the child that she can he responsible for herself and the child. She is in counseling and making improvements, but she must understand that she has an obligation to nurture a relationship between the child and the father. She once found him charming and should be able to find some qualities that are positive. Now, it's too late to act as if she were terrified of this man, so as to prevent a relationship. The court believes Mr. Slayter can he venomous, but does not believe lie is physically dangerous to the mother or the child. If he is, he will be prohibited from seeing the child under the Domestic Abuse Assistance Act.

7) Holiday Visitation

The court will recognize for this Plan the holidays of 4th of July and Thanksgiving, which are historical or patriotic holidays that have nothing to do with religion. The court will assign them as being seven day holidays that will alternate between the parties and will supercede the usual visitation time. In 2009, the father will have the 4th of July week, from Sunday at 9:00 A.M. to the following Sunday at 9:00 A.M. The mother will have Thanksgiving weeks in 2009 for the same time period. The parties will then resume the same schedule as before the holiday. In 2010, the mother shall have July 4th and the father will have Thanksgiving. The rotation shall be as described in 3) and 4) above for the months of December and whatever month in which Easter falls, without regard to the actual day of the celebrated event.

VISITATION 2010, 2011, 2012

The court has no idea if the parties will be able to follow the above plan. The court considers it restrictive for the father and, certainly, more restrictive than the recommendation made by the attorney appointed to represent the child. The attorney based his recommendations on the fact that he believed the parties should and would control the conflict. The court, however, has no basis on which to predicate a belief that the conflict will cease. If it does, the parties can alter anything in the courts plan for their own convenience. Even if they do stop the conflict, however, the court believes there must be some time to go by before either party begins to trust the other.

The 2009 plan is ordered to give the child time to adjust to the father and to give the parties time to get used

to dealing with each other. The court believes they should take advantage of the year's introduction to a more cooperative plan. The court finds that if all goes well and there is no new conflict, the parties should follow a less restrictive plan in 2010, as follows.

1). Four consecutive day and night visitation on the first Monday through Thursday of each month.

In January, 2010, the child will be three and, if the 2009 visitation proceeded as expected, should he used to the father's care taking and able to do well when spending the night away from the mother for four consecutive nights each month, beginning on the first Monday of the month at 5:30 P.M. through the first Friday of the month at 8:00 A.M.

2) 9:00 A.M. to 5:00 P.M. on alternating Saturday or Saturdays in the month.

In addition to the four consecutive days and nights on the first Monday through Thursday of the month, the father shall have 9-5 on any alternating Saturday remaining in the month, as follows below:

January 2010 – father has Monday the 4th at 5:30 until 8:30 on Friday the 8th; and Saturday the 16th and Saturday the 30th from 9:00 A.M. until 5:00 P.M.

February 2011- father has Monday the 1st at 5:30 through Friday the 5th at 8:30 A.M.; and Saturday the 13th and 27th for the appointed times.

March 2010 - father has Monday the 1st through the 5th for the appointed times and Saturdays the 13th and 29th for the appointed times.

April 2010 - father has Monday the 5th through the 9th at the appointed times and Saturday the 17th

May 2010- father has Monday May 3rd through 7th at the appointed times and Saturdays 15th and 29th at the appointed times.

June 2010 - the father has June 7th through the 11th at the appointed times and Saturday the 19th.

July - the father will have the child on Saturdays July 17th and 31st, because the mother has the July 4th week holiday time, which also falls on the first Monday of the month.

August - the father will have Monday the 2nd through the 6th, at the appointed times and Saturdays 14th and 28th.

September 2010- father will have Monday the 6th through the 10th at the appointed times and Saturday the 18th.

October 2010- the father will have Monday the 4th through the 8th; and Saturdays the 16th and 30th.

November 2010 - the father will have Monday the 1st through the 5th, at the appointed times; Saturday the 13th at the appointed time and Sunday the 21st through the 28th at the appointed times.

December 2010 - the father will have Monday the 6th through the 10th at the appointed times and Saturday the 18th.

The parties shall follow the 2010 schedule in all years until the child becomes subject to the school calender. They must agree to a standard 9/3 month visitation or return to court.

Each party shall pay their own costs.

Alexandria. Louisiana, this 30th day of December, 2008.

Signed: Honorable F. Rae Swent

District Judge, 9th Curcuit

CIVIL SUIT NUMBER 227,135

Division "C"

DANIEL SLAYTER NINTH JUDICIAL DISTRICT COURT

VERSUS PARISH OF RAPIDES

LAURA KAPLAN STATE OF LOUISIANA

Consolidated with

CIVIL SUIT NUMBER 227,157

Division "C"

LAURA KAPLAN NINTH JUDICIAL DISTRICT COURT

VERSUS PARISH OF RAPIDES

DANIEL SLAYTER STATE OF LOUISIANA

JUDGMENT

This cause came on for hearing pursuant to special assignment and present in open court were LAURA ELLEN KAPLAN, and her attorney Susan Ford Fiser, and DANIEL RAY SLAYTER, in proper person, and after hearing the law and the evidence and the testimony of the parties, for Written Reasons assigned,

IT IS ORDERED, ADJUDGED AND DECREED that LAURA ELLEN KAPLAN shall have sole custody of the minor child of the parties, Anna Grace Kaplan;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that DANIEL RAY SLAYTER is awarded visitation in accordance with the schedule set forth hereinbelow;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that as sole custodian, the mother has the .sole authority to decide the child's religious preference and to determine her spiritual and cultural upbringing;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the father shall have visitation from 9:00 a.m. until 5:00 p.m. on January 3, 10, and 17, 2009;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the father shall have three (3) consecutive Fridays overnight and the following Saturday, and on January 23, 30 and February 6, 2009, the father may pick up the child at 5:30 p.m. on Friday and keep the child until 5:30 p.m. on the following Saturday, January 24, 31 and February 7, 2009;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that beginning on Monday, February 16, 2009, if all other visits have taken place without any conflict, the father shall have visitation from 5:30 p.m. until Wednesday, February 18, 2009, at 5:30 p.m. and the same schedule in alternating weeks. For example, the next alternating two nights will begin on Monday, March 2, 2009, at 5:30 p.m. and the father will have visitation until Wednesday, March 4, 2009, at 5:30 p.m. The next alternating two overnights will begin on Monday, March 16, 2009, at 5:30 p.m. and will continue until 5:30 p.m. on Wednesday, March 18, 2009. The next alternating two nights will begin on Monday, March 30, 2009, at 5:30 p.m.

and continue until Wednesday, April 1, 2009, at 5:30 p.m. This rotation will continue, unless interrupted by a holiday as discussed below, and continue as before the holiday for the entirety of the year 2009;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that in addition, to the two overnights in alternating weeks, the father may enjoy visitation on alternating Saturdays from 9:00 to 5:30 p.m. (For example, when the father has visitation in the week beginning Monday, February 1 through Wednesday, February 18, 2009, at 9:00 a.m., he shall not also have the Saturday following the Thursday, but the Saturday preceding the Monday) a total of four overnight visits per month, plus two Saturdays during the month;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that as the sole custodian, the mother shall determine the daycare arrangements for the child;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that if the father becomes employed, that he may select a commercial daycare for the two weekdays that he has custody of the minor child;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the parties shall ordered to exchange the child at the Alexandria Police Station on Bolton Avenue or at the Rapides Parish Sheriff's Office desk on the third floor of the Rapides Parish Courthouse, and further that they shall obtain information to establish a routine of the mother arriving early to have a police officer standing at her side to witness and protect to the extent that she feels necessary;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Mr. Slayter will have to wait for the mother to leave, meaning drive away in her car, before he is to leave the building;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the parties shall enjoy the holidays of the 4th of July and Thanksgiving as follows:

> In 2009, the father will have the 4th of July week, from Sunday at 9:00 a.m. to the following Sunday at 9:00 a.m. The mother will have Thanksgiving weeks in 2009 for the same time period. The parties will then resume the same schedule as before the holiday. In 2010, the mother shall have July 4th and the father will have Thanksgiving. The rotation shall be as described above for the months of December and whatever month in which Easter falls, without regard to the actual day of the celebrated event.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that if all goes well and there is no new conflict, the parties shall follow a less restrictive plan in 2010, and the father shall enjoy visitation as follows:

1. Four consecutive day and night visitation on the first Monday through Thursday of each month, beginning on the first Monday of the month at 5:30 p.m. through the first Friday of the month at 8:00 a.m.

2. In addition to the four consecutive days and nights on the first Monday through Thursday of the month, the father shall have visitation from

9:00 a.m. – 5:00 p.m. on any alternating Saturday remaining in the month, as follows below:

January 2010 – father has Monday the 4th at 5:30 until 8:30 on Friday the 8th; and Saturday the 16th and Saturday the 16th and Saturday the 30th from 9:00 a.m. until 5:00 p.m.

February 2010 - father has Monday the 1 s4 at 5:30 through Friday the 5'h at 8:30 a.m.; and Saturday the 13th and 27'h for the appointed times.

March 2010 - father has Monday the 15' through the 5th for the appointed times and Saturdays the 13th and 29th for the appointed times.

April 2010 - father has Monday the 5th through the 9th at the appointed times and Saturday the 17th.

May 2010 - father has Monday May 31d through 7th at the appointed times and Saturdays 15th and 29th at the appointed times.

June 2010 - the father has June 7th through the 11th at the appointed times and Saturday the 19th.

July - the father will have the child on Saturdays July 17th and 31st, because the mother has the July 4th weekend holiday time, which also falls on the first Monday of the month.

August - the father will have Monday the 2nd through the 6th, at the appointed times and Saturdays 14th and 28th.

September 2010 - father will have Monday the 6th through the 10th at the appointed times and Saturday the 18th.

October 2010 - the father will have Monday the 4th through the 8th; and Saturdays the 16th and 30th.

November 2010 - the father will have Monday the 1st through the 5th, at the appointed times; Saturday the 13th at the appointed time and Sunday the 21st through the 28th at the appointed times.

December 2010 - the father will have Monday the 6'h through the 10th at the appointed times and Saturday the 18th.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the parties shall follow the 2010 schedule in all years until the child becomes subject to the school calendar, at which point they must agree to a standard 9 month/ 3 month visitation schedule or return to court;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Gregory Wampler, attorney appointed to represent the minor child, shall be awarded an $1,000,00 attorney fee, which shall be taxed as costs of court and paid by the parties equally; and

IT IS FINALLY ORDERED, ADJUDGED AND DECREED that each party shall pay their own costs.

JUDJGMENT RENDERED on December 30, 2008, and READ AND SIGNED on the 28th day of January, 2009, in Alexandria, Rapides Parish, Louisiana.

Honorable F. Rae Swent,

NINTH JUDICIAL DISTRICT JUDGE

Respectfully submitted,

SUSAN FORD FISER

P. O. Box 12424

Alexandria LA 71315-2424

(318) 442-8899

La. Bar Roll Number: 22,366

Attorney for LAURA ELLEN KAPLAN

FILED, DATE: January 28, 2009

D. Boylin, Deputy Clerk of Court

FILED & RECORDED, January 29, 2009

Carolyn J. Ryland, Clerk of Court, Rapides Parish, LA

CIVIL SUIT NUMBER 227,135

Division "C"

DANIEL SLAYTERNINTH JUDICIAL DISTRICT COURT

VERSUS PARISH OF RAPIDES

LAURA KAPLAN STATE OF LOUISIANA

Consolidated with

CIVIL SUIT NUMBER 227,157

Division "C"

LAURA KAPLAN NINTH JUDICIAL DISTRICT COURT

VERSUS PARISH OF RAPIDES

DANIEL SLAYTER STATE OF LOUISIANA

CERTIFICATE

I hereby certify that the proposed judgment filed herein and attached hereto was circulated to Mr. Daniel Slayter by letter dated January 12, 2009, which letter was properly addressed to Mr. Daniel Slayter, and that at least three working days for comment have passed before presentation of said judgment to the Court, and I hereby further certify that no opposition has been received from Mr. Daniel Slayter by undersigned counsel.

SUSAN FORD FISER

STATE OF LOUISIANA

COURT OF APPEAL, THIRD CIRCUIT

09-1274 consolidated with 09-1275

D. R. S.

VERSUS

L. E. K.

consolidated with

L. K.

VERSUS

D. S.

Judgment rendered and mailed to all parties or counsel on March 10, 2010. Applications for rehearings may be filed within the delays allowed by La.Code Cis. R an. 2166 or La. Code Crim. P. art. 922.

****

APPEAL FROM THE

NINTH JUDICIAL DISTRICT COURT

PARISH OF RAPIDES, NOS. 227,135 AND 227,157
DIV. "C"

HONORABLE F. RAE SWENT, DISTRICT JUDGE

****

JAMES T. GENOVESE

JUDGE

****

Court composed of James T. Genovese, Shannon J. Gremillion, and David E. Chatelain,* Judges.

REVERSED AND REMANDED.

*Honorable David E. Chapman participated in this decision by appointment of the Louisiana Supreme Court as Judge Pro Tempore.

David C. Hesser

2820 Jackson Street

Alexandria, Louisiana 71301

(318) 542-4102

COUNSEL FOR PLAINTIFF/APPELLANT: D.R.S.

Susan Ford Fiser

Post Office Box 12424

1634 Metro Drive

Alexandria, Louisiana 71315-2424

(318) 442-8899

COUNSEL FOR DEFENDANT/APPELLEE: L.E.K.

GENOVESE, Judge.

In this child custody case, the father, D.R.S,[1] appeals the trial court's judgment awarding the

[1] Pursuant to Uniform Rules – Court of Appeals, Rules 5-1 and 5-2, the initials of the parties will be used to protect and maintain the privacy of the minor child involved in these proceedings.

mother, L.E.K., sole custody of the minor child, A.G.K., subject to visitation afforded D.R.S. as set forth in the visitation schedule therein, and decreeing that L.E.K. has the sole authority to decide the religious preference of the child. For the following reasons, we reverse and remand.

FACTS

A.G.K. is the three-year-old child of D.R.S. and L.E.K., who were never married. Two weeks after the birth of the child, D.R.S. filed a Petition to Determine Paternity, Set Shared Custody and Set Child Support. Pursuant to an agreement between the parties, an Interim Judgment on Rule was signed by the trial court in January 2008, ordering joint custody of the child and designating L.E.K. as the domiciliary parent. No specific visitation schedule was included in the interim judgment; instead, it provided that visitation was to "be as the parties can agree and in accordance with the guidance and recommendations of a professional counselor, Dr. R. James Logan."

Shortly thereafter, in March 2008, D.R.S. filed a Motion and Order for Rule for Contempt; for Sole Custody and Bond to Insure Compliance with Custody Order alleging as follows:

[B]ecause of [L.E.K.'s] consistent refusal to allow custody and visitation by [him] and the emotional damage it may do to the Minor Child ... it is in the best interest of the Minor Child that he be awarded

sole care, custody and control of the Minor, subject to reasonable visitation [as set forth] by the Court.

L.E.K. responded with a rule seeking sole custody, subject to visiation by D.R.S.[2]

An Interim Order was entered by the trial court setting forth the visitation rights of D.R.S. with the child and appointing Dr. Daniel J, Lonowski as the trial court's expert to evaluate the parties and make a recommendation as to a custodial arrangement that would be in the best interest of the child.

Thereafter, the parties filed various pleadings containing a plethora of contentious allegations which are indicative of the level of conflict between them. Prior to trial, Gregory N. Wampler was appointed by the trial court as the attorney for the minor child. Additionally, following a pre-trial conference, D.R.S. filed a Motion to Recuse the presiding judge, who had been appointed as a result of prior recusals.

The pertinent issues of custody and visitation were heard by the trial court on December 9, 2008. In its Reasons for Judgment, the trial court awarded sole custody to L.E.K. and set forth a restrictive visitation schedule on behalf of D.R.S. for the year 2009. Also, in its Reasons for Judgment, the trial

---

[2] L.E.K. also instituted separate proceedings with the filing of a Petition for Protection from Abuse, and the two proceedings were consolidated by the trial court.

court stated that "if all goes well," different visitation rights for the years 2010-2012 were to be adhered to by the parties "in all years until the child becomes subject to the school calender[,]" at which time "[t]hey must agree to a standard 9/3 month visitation or return to court."

Additionally, the trial court declared that L.E.K. had "the sole authority to decide the child's religious preferences." Further, the trial court devised the visitation schedule such that D.R.S. would not have the minor child on Sunday or Wednesday nights so as "to eliminate any question of whether the child gets taken to any church service."

A judgment consistent with the trial court's written reasons was signed January 28, 2009. Therefore, D.R.S. filed a motion for a new trial which the trial court denied on June 24m 2009, and that judgment was signed on August 18, 2009. D.R.S. appeals both the January 28, 2009 and August 18, 2009 judgments.

ASSIGNMENTS OF ERROR

On appeal, D.R.S. sets forth the following assignments of error:

1. The [t]rial [court] erred in denying a hearing on the motion to recuse.

2. The [t]riai [c]ourt was erred [sic] and clearly wrong when it awarded sole custody to [L.E.K.] without clear and convincing evidence.

3. The [t]rial [c]ourt erroneously held that [L.E.K.] had the right to determine the minor child's religion and cultural upbringing.

4. The trial court erred in creating a visitation schedule designed to keep [D.R.S.] away from the child on religious days.

LAW AND DISCUSSION

Motion to Recuse

Following the pre-trial conference, D.R.S. filed a motion to recuse the presiding judge. On appeal, he contends that the trial court erred in failing to have a hearing on the motion prior to denying same, On this issue, we note that D.R.S. did not seek a review of that ruling prior to trial. Moreover, this court takes judicial notice that this judge has since retired and no longer presides in the Ninth Judicial District Court. However, since we reverse the decision of the trial court and the judge in question has retired, the motion to recuse has been rendered moot.

Sole Custody

D.R.S. asserts on appeal that the award of sole custody to L.E.K. was erroneous. We agree.

The standard of review in child custody matters has been clearly stated by this court:

> The trial court is in a better position to evaluate the best interest of the child from its observances of the parties and witnesses; thus, a trial court's determination in a child custody case is entitled to great weight on appeal and will not be disturbed unless there is a clear abuse of discretion.
>
> *Hawthorne v. Hawthorne*, 96-89, p. 12 (La.App. 3 Cir. 5/22/96), 676 So.2d 619, 625, *writ denied*, 96-1650 (Lai 0125/96), 681 So.2d 365.

Gremillion v. Grernillion, 07-492, p. 4 (La_App. 3 Cir. 1013/07), 966 So.2d 1228,1231-32.

Louisiana Civil Code Article 132 (emphasis added) provides as follows:

> If the parents agree who is to have custody, the court shall award custody in accordance with their agreement unless the best interest of the child requires a different award.
>
> In the absence of agreement, or if the agreement is not in the best interest of the child, the court shall award custody to the parents jointly; however, *if custody in one parent is shown by clear and convincing*

evidence to serve the best interest of the child, the court shall award custody to that parent.

Louisiana Civil Article 132, Comment (b), expressly notes that ' [t]his latter provision is intended to strengthen the preference for joint custody provided for in former Civil Code Article 131(A)." The effect of the 1993 revisions were discussed by the second circuit which stated as follows:

> La. C.C. arts. 131, 132 and 134, as amended by Act No. 261 of 1993, have as their focus the best interest of the child in any contest over joint or sole custody. Article 132 states that in the absence of an agreement regarding custody, "the court shall award custody to the parents jointly; however, if custody in one parent is shown by clear and convincing evidence to serve the best interest of the child, the court shall award custody to that parent." Article 134 provides twelve relevant factors for the court to consider in determining the best interests of the child.
>
> The author of a 1994 Louisiana Law Review article discussed the change in the focus brought about by the 1993 amendments, as follows:
>
> Under present Article 132, the focus of the inquiry is not on the joint custody arrangement; it is on sole custody in a particular parent. It must be shown, by clear

> and convincing evidence, that custody in that parent will serve the best interest of the child. The question changes from why joint custody is not in the best interest of the child to why sole custody in a particular parent is in the best interest of the child. Although these issues may overlap, the burden on the parent seeking sole custody is to demonstrate that the granting of custody to that parent alone will be in the best interest of the child.

Kenneth Rigby, *1993 Custody and Child Support Legislation*, 55 La. L.Rev. 103, 105 (1994). The author further noted that the test shifted from "a negative to a positive one, from why joint custody to both parents is not in the child's best interest to why sole custody in a particular parent is in the child's best interest." *Id.* (Emphasis in original).

Harper v. Harper, 33,452, pp. 4-5 (La.App. 2 Cir. 6121100), 764 So.2d 1186, 1189-90 (footnote omitted).

In considering an issue of custody, in addition to the presumption in favor of joint custody, the burden of proof of the parent seeking sole custody is also significant. The second circuit, in *Harper*, 764 So.2d at 1190, elaborated on this heightened evidentiary burden opining as follows:

> The "clear and convincing" evidentiary standard is a heavier burden of proof than the usual civil case "preponderance of the

> evidence" standard, but is less burdensome than the "beyond a reasonable doubt" standard of a criminal prosecution. ["]To prove a matter by clear and convincing evidence means to demonstrate the existence of a disputed fact is highly probable, that is, much more probable than its nonexistence." *Renter v. Willis-Knighton Medical Center*, 28,589 (La.App.2d Cir.8123196), 679 So.2d 603.

The record of these proceedings is replete with caustic and acrimonious accusations by both parties. There have been allegations of infidelity, physical abuse, drug and alcohol abuse, "secreting" ofthe minor child, harassment, and employment sabotage, to name but a few. In the words of the trial court, "[b]oth parties have engaged in vindictive behavior that greatly affects their own credibility [,]" and which the trial court "ha[d] no hesitation to say . . . [was] the most contentious custody dispute she has ever had presented."

We have thoroughly reviewed the record of these proceedings, and we purposely refrain from regurgitating the recitations detailed therein. We find it readily apparent that there is culpability to be shared by both parties and that D.R.S. bears more culpability than L.E.K. However, in conducting our appellate review, we remain mindful that the issue before this court is whether the trial court abused its discretion in determining that L.E.K. met her burden of proving, by clear and convincing evidence, that the

award of sole custody of A.G.K. to her mother *is in the best interest of the minor child*. We find that the evidence in the record falls short of proof by clear and convincing evidence that the award of sole custody to L.E.K. is in the best interest of the minor child as required by La,Civ.Code art. 132.

The trial court provided lengthy Reasons for Judgment, noting therein that "[p]art of the problem in this case has been the duration of the dispute." Additionally, "[t]here have been multiple experts appointed to assist the parties and the court." The trial court noted the appointment of Dr. Logan to serve as a parenting coordinator to assist the parties in preparing a custody plan, and it also noted the subsequent appointment of Dr. Lonowski. The trial court also made reference to the appointment of an attorney to represent the minor child and to make a recommendation on custody to the trial court.

The opinions of these individuals, which were provided to the trial court, support an award of joint custody. The trial court rejected these opinions as it was free to do; however, as evidenced by the fact that both parties argue same in support of their opposing positions, this evidence was not inconsequential. Most importantly, the trial court does not squarely address the crucial question of why an award of sole custody to L.E.K. is in the best interest of A.G.K. as mandated by La.Civ.Code art. 132. Thus, the trial court's ruling on sole custody is not supported by the evidence.

In the trial court's Reasons for Judgment, there is considerable discussion regarding the actions of the parents and the continuing animosity between them. After considering all of the evidence, the trial court concluded that "[t]he evidence of continued and unreasonable conflict is clear and convincing evidence that these parents are not able to jointly parent the child." Again focusing on the conflict between the parents, the trial court expressly noted its "wish[] to make clear to the parties that the award of sole custody is because of the ongoing conflict." The trial court, however, provides no explanation, nor does it reference any particular facts in support of the necessary conclusion that the best interest of A.G.K. would be served by an award of sole custody to L.E.K. Neither the experts nor the attorney appointed to represent A.G.K. presented any clear and convincing evidence that sole custody in favor of L.E.K. was in the best interest of the minor child. In fact, to the contrary, their testimony supported joint custody as opposed to sole custody.

After reviewing the entire record of these proceedings, we find that L.E.K. failed to meet her burden of proving by clear and convincing evidence that an award of sole custody is in the best interest of A.G.K. as required by La.Civ.Code W. 132. Therefore, the evidence presented was insufficient to overcome the statutory preference in favor of joint custody. Consequently, the trial court abused its discretion in awarding sole custody of the minor child

to L.E.K. The parties are hereby granted joint custody, with L.E.K. being designated the domiciliary parent and D.R.S. granted specified visitation privileges, particularly, but not limited to, holiday and summertime visitation, to be determined pursuant to a hearing before the trial court on remand.

Religious Preference and Cultural Upbringing

D.R.S. also asserts on appeal that the trial court erred in holding that L.E.K. had the right to determine the minor child's religious and cultural upbringing. We agree. Though we are reversing the trial court's award of sole custody to the mother in favor of a joint custody award in accordance with La.Civ.Code art. 132, we find it necessary to address this issue for the sake of clarity since we have designated the mother as the domiciliary parent.

The trial court's Reasons for Judgment state that "[a]s the party with sole custody, the mother will have the right to determine the child's spiritual and cultural upbringing." Additionally, "[a]s the result of the court's decision that there should be sole custody, the mother has the sole authority to decide the child's religious preference[,]" and "it is within her authority to decide what belief system is presented to the child in her home and any home in which the child visits or resides."

D.R.S. argues to this court that this is "particularly disturbing," considering the Louisiana

Children's Code's express definition of "[r]esidual parental rights" as "those rights and responsibilities remaining with the parents after the legal transfer of custody of their child, including but not necessarily limited to right of visitation, consent to adoption, right to determine religious affiliation, responsibility of support, and the right of inheritance from the child." La.Ch.Code art. 116(24) (emphasis added). Additionally, the same definitional article of the Louisiana Children's Code defines "legal custody" as follows:

> The right to have physical custody of the child and to determine where and with whom the child shall reside; to exercise the rights and duty to protect, train, and discipline the child; the authority to consent to major medical, psychiatric, and surgical treatment; and to provide the child with food, shelter, education, and ordinary medical care, *all subject to any residual rights possessed by the child's parents.*

La.Ch.Code art. 116(12) (emphasis added)[3]

In the case of *Becnel v. Beenel*, 98-593 (La.App. 5 Cir. 3125199), 732 So.2d 589, *writ denied*, 99-1165 (La. 6/4/99), 744 So.2d 630, following their divorce,

---

[3] The particular provisions of the Louisiana Children's Code governing voluntary transfer of custody likewise defines and expressly subjects the rights of a legal custodian with "physical custody" to "any residual rights and responsibilities." LaCh.Code art. 1511(1)© and (2).

the mother attempted to deny or restrict the father's visitation rights with his children based upon asserted religious beliefs of the children. In considering this issue, the fifth circuit stated as follows:

> The parent who drifts away from his children because of a divorce or separation may be able to improve his damaged relationship with his offspring later in life, but he and they will never be able to re-create their lost time together. For this reason, the fit, noncustodial parent who wants to remain an active force in his children's lives should be given the utmost encouragement by the courts. Curtailing his visitation, or dictating the character of it, in order to further the religious wishes of a custodial parent is not in harmony with this goal[.]
>
> ***
>
> [C]ourts that treat the visitation and constitutional rights of parents cavalierly or casually serve neither the parties before them nor the cause of justice.

Higginbotham, *"Mom, Do .I Have to Go to Church?": The Noncustodial Parent's*

Obligation to Carry Out the Custodial Parent 's Religious Plans, 31 Fam.L.Q. 585, 596 (1997).

Id. at 595.

Though the custodial or domiciliary parent may raise the child in a legitimate religion of his/her own choosing, that parent may not force that religion or religious affiliation upon the noncustodial parent or preclude the noncustodial parent from pursuing his/her own religious affiliation and sharing same with the child provided doing so does not negatively affect the best interests of the child. There is no statutory nor jurisprudential authority to support the trial court's ruling that the custodial or domiciliary parent has the sole authority to mandate "what belief system is presented to the child in ... any home in which the child visits or resides." We, therefore, reverse that portion of trial court's judgment which grants L.E.K. the sole authority to decide the child's religious preference and to determine her spiritual and cultural upbringing."

Wednesday and Sunday Visitation

In his final assignment of error, D.R.S. asserts that the trial court erred in creating a visitation schedule designed to keep him away from the child on religious days. Specifically, he contends that the trial court erred in refusing to grant him visitation with the child on Sundays and Wednesdays.

However, we note that the June 5, 2009 court minutes reflect a modification of visitation by the parties pursuant to stipulation as set forth in the judgment signed August 18, 2009, making said modification effective July 17, 2009. Though that judgment indicates that the parties were present on June 5, 2008, and stipulated to the Consent Judgment on that date, the minutes of court accurately reflect that the modification was actually made on June 5, 2009. It is further noteworthy that this modification in the Consent Judgment was entered into after the judgment which is the subject of this appeal, but before the August 18, 2009 judgment denying D.R.S.'s Motion for New Trial, which is likewise before us on appeal. In that Consent Judgement, the parties stipulated, among other things, that D.R.S. "shall not object to the relocation of [L.E.K.] and the minor child to Baton Rouge, Louisiana."

Additionally, the judgment contains the stipulation of the parties to alter the visitation schedule of D.K.S. to include "visitation with the minor child from 6:00 p.m. Friday until 6:00 p.m. Sunday and every other weekend thereafter in that manner."

The Consent Judgment puts this court in the awkward and peculiar position of having to review a trial court judgment on appeal when the parties, via stipulation, have subsequently altered that judgment, coupled with the fact that, presumably,

the child and the mother have since relocated to Baton Rouge. We, therefore, find that the Consent Judgment renders this assignment of error moot.

Having found that joint custody is in the best interest of the minor child, with the mother being designated as the domiciliary parent, and taking into consideration the subsequent Consent Judgment and what appears to be the relocation of the mother and child to Baton Rouge, Louisiana, we are compelled to remand this case to the trial court for a hearing on the issue of specified visitation privileges particularly, but not limited to, holiday and summertime visitation. In the interim, D.R.S.'s present visitation privileges, as modified herein, remain in force and effect unless and until modified by the trial court at a hearing relative to visitation privileges pursuant to this remand.

DECREE

The judgment of the trial court awarding sole custody of A.G.K. to L.E.K. is reversed, and L.E.K. and D.R.S. are hereby awarded joint custody of the minor child, A.G.K., with L.E.K. being designated the domiciliary parent. The judgment of thetrial court granting L.E.K. the sole authority to decide the child's religious preference and to determine her spiritual and cultural upbringing is also revised. Additionally, this matter is hereby remanded to the trial court for a hearing to determine specified visitation privileges particularly, but not limited to,

holiday and summertime visitation in favor of D.R.S. D.R.S.'s present visitation privileges, as modified herein, remain in force and effect pending the hearing on visitation privileges pursuant to this remand. Costs of this appeal are assessed equally between D.R.S.

and L.E.K.

REVERSED AND REMANDED.

THE SUPREME COURT OF THE STATE OF LOUISIANA

NO.2010-CJ'0794

D.R.S. VS. L.E.K. C/W L.H.

VS.

D.S.

IN RE: Confidential Party; - Defendant; Applying For Writ of Certiorari and/or Review, Parish of Rapides, 9b Judicial District Court Div. C, Nos. 227,135, 227,157; to the Court of Appeal, Third Circuit, Nos. 09-1274, 09-1275;

April 30, 2010

Denied JPV

BJJ

JTK

JLW

GGG

MRC